

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION
3 HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE
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5 UNITED STATES OF AMERICA,)
6)
7 Plaintiff,)
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9 vs.)
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JOSEPH MARTIN GOVEY,)
Defendant.)
_____)

CERTIFIED TRANSCRIPT

Case No.
8:17-cr-00103-CJC-1

14 REPORTER'S TRANSCRIPT OF
15 FURTHER PRETRIAL CONFERENCE
16 WEDNESDAY, JANUARY 24, 2018
17 2:03 P.M.
18 SANTA ANA, CALIFORNIA
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1 **SANTA ANA, CALIFORNIA; WEDNESDAY, JANUARY 24, 2018**

2 **9:05 A.M.**

3 THE COURTROOM DEPUTY: Calling Item No. 2,
4 SACR 17-103, United States of America versus Joseph Martin
02:03PM 5 Govey.

6 Counsel, please state your appearances.

7 MR. MARRETT: Good afternoon, Your Honor. Brad
8 Marrett for the United States. And with me at counsel table is
9 AUSA Gina Kong.

02:03PM 10 THE COURT: Good afternoon to both of you.

11 MR. SCOTT: Good afternoon, Your Honor. Tim Scott
12 here with Mr. Govey. He is present before the Court in
13 custody.

14 THE COURT: Hello, Mr. Govey. Hello, Mr. Scott.

02:03PM 15 Okay. Well, on my list we have four items to talk about.
16 Maybe there's more items that you want to add. Why don't I
17 just get to my four.

18 First of all, one deals with Agent Paris's testimony.
19 I've gone through both sides' briefs. Let me tell you what my
02:04PM 20 thoughts are. Agent Paris should be able to testify regarding
21 drug distribution practices and methods including packaging and
22 quantities sold. He has 25 years of experience, participated
23 in over 1,000 investigations and spoken to hundreds of suspects
24 and cooperating witnesses.

02:04PM 25 His testimony is based on this extensive experience and

1 will be helpful to the jury in determining the critical issue
2 of whether the meth seized was for distribution or Mr. Govey's
3 own personal use.

4 I do not believe a *Daubert* hearing is necessary with
02:04PM 5 respect to his testimony on these issues. But Agent Paris's
6 testimony should not include giving a legal opinion whether the
7 quantities involved were distribution or personal use
8 quantities. That would not be helpful to the jury, and it
9 would usurp the jury's function of determining whether the
02:05PM 10 government has met its burden of proving Mr. Govey's guilt. In
11 effect, he is saying that Mr. Govey is guilty of distributing
12 methamphetamine if I allow the testimony in the form indicated
13 in the briefs.

14 Agent Paris also should not be summarizing or highlighting
02:05PM 15 or arguing the evidence that was seized in this case. Indeed,
16 I think he would be an improper summary witness, again,
17 usurping the jury's function.

18 So that's the line that I'm trying to walk. I don't know
19 if it's an impossible one to walk, but as long as he's not
02:06PM 20 talking about the actual evidence in this case, it would seem
21 to be fair and appropriate, because a jury is not going to
22 understand distribution of meth, how it's packaged, baggies,
23 pay/owe sheets. He's not -- the jury is not going to
24 understand what is a personal use; someone lights up meth, how
02:06PM 25 many grams or percentage of grams. They're not going to know

1 that. At least I hope they don't know that. And they're not
2 going to have familiarity with the quantity if it's sold. But
3 where I think it crosses the line and it's improper legal
4 conclusions and opinions, if he's going to start to say, "They
02:07PM 5 seized this much. Was that for Mr. Govey's personal use or was
6 it for distribution?" that's improper. I'm not comfortable
7 with that at all. That's that issue.

8 MR. SCOTT: Your Honor, can I make a comment on that
9 issue?

02:07PM 10 THE COURT: I think what would be more efficient is
11 if I go -- because the brass knuckles and what I'm calling the
12 gang evidence, I understand they're going to try to get this
13 through Agent Paris. So it might be better if I got all of it.
14 And then I'll give everybody an opportunity to clarify or
02:07PM 15 explain things.

16 MR. SCOTT: Very good.

17 THE COURT: The brass knuckles evidence I don't
18 think is relevant, quite frankly. And I'm a little surprised
19 that the agent and the government would try to get that in. It
02:08PM 20 just smacks of character evidence to me. It's not evidence of
21 drug distribution, it's not unique to drug crimes. I mean, I
22 see actually more semiautomatic weapons involved in drug
23 distribution cases than I see brass knuckles. I think it's
24 going to be very difficult for the jury, if not impossible, to
02:08PM 25 consider this evidence for proper purposes, not improper

1 character purposes, specifically that Mr. Govey is a dangerous
2 person.

3 And then my feeling is the same with respect to the gang
4 markings. Again, this is not a gang case. The charges are not
02:08PM 5 gang charges. I realize, and that's one of the issues I do
6 want to get clarification from the defense, and this, I think,
7 will pertain to the next motion dealing with vindictive
8 prosecution and punishment, is I don't see how I'm going to be
9 able to keep out gang evidence.

02:09PM 10 But with that said, if it comes in, it's going to be for a
11 proper purpose. It's not going to come in as character
12 evidence. And I believe with respect to this motion and the
13 discrete piece of evidence that Mr. Scott and Mr. Govey are
14 attacking, this is character.

02:09PM 15 Then the third issue is the vindictive prosecution and
16 sentences of punishment. And it's kind of been an evolving
17 process for me. I don't believe I've said anything
18 inconsistent with what my current thoughts are on this subject,
19 but I'm open to be persuaded either way on this issue.

02:10PM 20 The line that I've tried to walk is if an Orange County
21 Sheriff deputy or an Orange County Sheriff investigator is a
22 percipient witness, like Deputy Larson or Investigator Beeman,
23 the defense can cross-examine them regarding any motive or bias
24 they have against Mr. Govey. And if that motive or bias is
02:10PM 25 based on or relates to the informant scandal or Mr. Govey's

1 2012 case, so be it, it's going to come in.

2 What I'm trying to say and at least it's more clear in my
3 mind, I don't see this case being *Dekraai* 2 and calling
4 witnesses to prove up the informant scandal and any wrongdoing
02:11PM 5 by the Orange County Sheriff's Department if it isn't directly
6 linked to a percipient witness in this case.

7 My understanding is Deputy Larson and Deputy Beeman are
8 percipient witnesses in this case. Defense has a right to
9 elicit any motive or bias that any witness has as does the
02:11PM 10 government on any witness the defense may call. And if that
11 motive or bias is grounded in the informant scandal, again, so
12 be it. There's nothing I can do about it.

13 I agree with you, Mr. Marrett, but I don't want us to be
14 talking by one another. We're not here to say that you and the
02:12PM 15 U.S. Attorney's Office has a vindictive motive against
16 Mr. Govey. You're not a percipient witness. But if it's a
17 percipient witness, it's coming in.

18 And again, I don't know what exactly the defense has in
19 mind, but if part of the motive and bias deals with punishment
02:12PM 20 and the fact that you have mandatory minimums in federal court,
21 and that deals with punishment, the defense wants to bring it
22 in, they can.

23 And Mr. Scott, we had a discussion, it wasn't a debate, it
24 was discussion -- you know, it's a two-edged sword, you know.

02:12PM 25 I -- I'm going to leave it to you and Mr. Govey to do the

1 defense. I'm not here to armchair quarterback you and
2 micromanage. But, you know, Public Enemy Number One, the Aryan
3 Brotherhood, mandatory minimums is pretty scary stuff. And I
4 can give limiting instructions, and I'm prepared to give
02:13PM 5 limiting instructions, but, you know, I don't know if you're
6 going to get the bang for the buck for that. So I don't know
7 exactly how you need to -- or want to present it.

8 But at a very simple level, and I hope you at least -- you
9 might not agree with me, Mr. Marrett, but where I'm trying to
02:13PM 10 walk the line is a percipient witness has to answer questions
11 about any motive or bias he or she might have. That's pretty
12 fundamental Rules of Evidence, and I can't keep it out. And if
13 that deals with punishment, mandatory minimums, deals with the
14 informant scandal, deals with asserting your Fifth Amendment
02:14PM 15 rights, it is what it is. It's coming in.

16 MR. MARRETT: Can I address the motion, Your Honor?
17 I think you said you had four points.

18 THE COURT: I had four. And the fourth is just -- I
19 don't want us to forget it -- is if the defense is going to
02:14PM 20 probe with percipient witnesses, the motive or bias, then I do
21 believe gang evidence of Public Enemy Number One and the Aryan
22 Brotherhood, the jury is going to hear about it. And I have
23 some proposed language dealing with the limiting instruction
24 that I would give to the jury during jury selection, at the
02:14PM 25 beginning of the trial, during the trial, and at the end of the

1 trial.

2 MR. MARRETT: So I'm going to try to take these in
3 order, Your Honor.

4 So just I just want to make sure that I'm clear as to the
02:15PM 5 Court's ruling regarding Special Agent Paris's testimony. And
6 I suppose that would -- it would apply to any expert testimony
7 on the subject.

8 THE COURT: True. And just so we're all clear,
9 these are my tentatives. I was looking forward to hearing
02:15PM 10 everybody's thoughts. So if I change, I don't want anybody to
11 say, "Oh, he's flip-flopping."

12 MR. MARRETT: Understood, Your Honor. And so I may
13 have just misunderstood what the Court was saying, but what I
14 understand the Court to be -- its tentative ruling is that the
02:15PM 15 witness cannot opine on the ultimate issue of whether the 44
16 grams -- net grams were for the purposes of distribution.

17 THE COURT: That's correct. And just so we're
18 clear, I'm not commingling the 704 issue with the 702 issue.
19 My issue is a 702, 403 issue. 704, I understand, is the issue
02:16PM 20 about a person's mental state. That's not what I'm talking
21 about.

22 What I'm talking about here is it cannot be a legal
23 conclusion that the jury needs to make, and it would not be
24 helpful for the jury to hear the expert say Mr. Govey's guilty.
02:16PM 25 Because that's, in effect, if I'm understanding your disclosure

1 correctly, you're basically saying Mr. Govey had the 37.5 grams
2 to -- and that was obviously for distribution purposes, not
3 personal use. I think that's an improper legal conclusion.

4 MR. MARRETT: And so -- and I suppose we're talking
02:17PM 5 about potentially dangerous line-drawing scenarios here. But I
6 think if I'm hearing the Court correctly, the Court is going to
7 allow the experts to testify as to the ultimate issue of intent
8 to distribute and the expert's opinion as to what items are,
9 say tools of the trade for somebody who's distributing drugs
02:17PM 10 and why that's indicative of an intent to distribute.

11 THE COURT: Yes. Based on his experience, not on
12 the facts of this case. Because he's not -- as I understand,
13 he's not a percipient witness in this case. He wasn't
14 involved; correct?

02:17PM 15 MR. MARRETT: Right. He was not a percipient
16 witness.

17 THE COURT: So if he wants to talk about, "Okay,
18 I've done hundreds of drug cases, investigations. I've talked
19 to hundreds of people. This is how you distribute meth. This
02:17PM 20 is the quantities. This is the packaging. This is the pay/owe
21 sheets, indicia of distribution," I think that's proper.

22 And Mr. Scott can cross-examine as aggressively as he
23 wants on those opinions. If you want to ask him about, "Okay,
24 what is the most amount of drugs that you've seen an individual
02:18PM 25 possess? What is the least amount of drugs that you've seen an

1 individual or suspect distribute? What in your experience in
2 these cases talking to people is a usable amount of meth?"
3 That's okay.

4 And then you, in closing argument, you're going to have
02:18PM 5 to, you know, connect the dots, so to speak. You're going to
6 have to say, "Okay, you heard this agent say this is what a
7 usable quantity is, and you heard him when he said what a
8 distributable amount is, and Mr. Govey was found with this
9 amount, he had it for distribution."

02:19PM 10 Mr. Scott's going to do the opposite. He may be able to
11 elicit testimony that relatively speaking for DEA cases, 37
12 grams, with all due respect, doesn't seem to be a lot. I have
13 many, many more cases where the quantities are much, much
14 larger. And for whatever it's worth, it's not my place,
02:19PM 15 it's -- there must be a story why Mr. Govey is here in Federal
16 Court, because I'm having a hard time believing it's over 37.5
17 grams. That's not an international cartel distribution,
18 assuming it's a distribution. That sounds like he's doing it
19 for friends and acquaintances.

02:20PM 20 But you have the right to bring the charges. That's your
21 job, it's not my job. But like I -- I don't think I'm saying
22 anything that's shocking you. I remember one of our earlier
23 hearings I was wondering about the quantity of drugs here, wow,
24 we're making this a big federal case over this quantity, and
02:20PM 25 that surprised me.

1 MR. MARRETT: Well, I mean certainly, Your Honor, we
2 do bring cases that have much larger quantities involved. The
3 quantities involved here are still substantial quantities that
4 are, in the government's view, distribution quantities. So,
02:20PM 5 you know, I don't think it takes away from the seriousness of
6 the offense that it's not a multi-kilo case. I think it's
7 still a large quantity that, you know, merits the prosecution
8 here.

9 THE COURT: And that's -- and I don't mean any
02:21PM 10 disrespect. That is your call. I'm just -- this case, we got
11 to now deal with the informant scandal. We have to deal with a
12 deputy, sworn police officer asserting his Fifth Amendment
13 rights. We got -- I've had to now sign off on a protective
14 order where you have to review and disclose to the defense
02:21PM 15 confidential information about the federal investigation of the
16 Orange County Sheriff's and DA's office. I mean, that's pretty
17 serious stuff. And I'm not saying in any way you're
18 compromising that investigation. I sure hope you're not. But,
19 you know, I sure hope Mr. Govey's worth it. That's my point.

02:21PM 20 MR. MARRETT: Sure. And I guess, Your Honor, at the
21 risk of skipping over your second point, a few of the things
22 the Court touched on bleed into the third point, which is the
23 motion the government filed about excluding reference to or
24 arguing about vindictive prosecution and the, you know,
02:22PM 25 punishment in this case.

1 I think, you know -- I do want to be clear that the
2 government's not seeking to relitigate the Court's prior
3 rulings. Obviously we made our motion. The Court made its
4 rulings about the percipient witnesses and their potential
02:22PM 5 biases and potential motives, but there is a -- and I think
6 where the line needs to be drawn, and this is the purpose of
7 filing the motion that we did, is that the line needs to be
8 drawn at the point where the deputies are making charging
9 recommendations to the DA.

02:22PM 10 Because at the point that the DA is determining at least
11 initially in the State case whether to bring charges and then
12 from there whether the case is referred to a federal agency and
13 referred to the U.S. Attorney's Office, all of that is a
14 question about the motivations for the prosecution itself. And
02:22PM 15 that's not something that a percipient witness is going to have
16 knowledge about to testify to.

17 THE COURT: Stop you there, because you just said
18 something that I don't know whether it's true. If you're -- if
19 what you just said there is true, that these percipient
02:23PM 20 witnesses had no involvement in these charges being referred to
21 the feds and then the feds prosecuting, then I think you and I
22 have an agreement, Mr. Marrett. Let me repeat that. We have
23 an agreement. But that's not my understanding. That's the
24 problem.

02:23PM 25 Now maybe Mr. Scott is now more informed and knows stuff,

1 but I recall Mr. Scott telling me that Investigator Beeman was
2 involved in the referral. And if that's the case, then I don't
3 see how I can keep that out because that is part of the motive
4 or bias.

02:23PM 5 MR. MARRETT: Well, and I guess I think there's
6 still the issue, Your Honor, of the fact that it was discussed
7 or referred to a federal agency. There is further
8 decision-making that goes on before the U.S. Attorney's Office
9 accepts the case and decides to prosecute a case going forward.

02:24PM 10 THE COURT: I agree, but that's a separate point,
11 Mr. Marrett. I want you to understand, it's the witness's
12 motive or bias. What the witness did to try to get Mr. Govey,
13 it's not your conduct, it's not the fed's conduct, it's the
14 percipient witness's conduct.

02:24PM 15 MR. MARRETT: Well, what I'm saying, Your Honor, is
16 that it's -- the decision whether to prosecute the case or not
17 is solely with the U.S. Attorney's Office. It's not -- it's
18 not influenced by who brought the case or what their
19 motivations were for bringing the case.

02:24PM 20 THE COURT: And I would agree with you it's not a
21 defense to the charges, but it is an issue of motive or bias
22 that the jury needs to be told about.

23 MR. MARRETT: And so I think, Your Honor, and this
24 was one of the points we raised in our motion, is that to the
02:25PM 25 extent the defense is allowed to get into the motive or bias, I

1 think in fairness the government should be able to rebut that
2 by bringing in evidence of why the charges were brought to
3 rebut that motive or bias, and that evidence would include
4 things like defendant's prior criminal history and other
02:25PM 5 evidence that -- the convictions that the Court has said aren't
6 coming in. I think in fairness, the government needs to use
7 that evidence to rebut the bias that defense is suggesting is
8 present.

9 THE COURT: Maybe. And that was the basis of my
02:25PM 10 comment earlier to Mr. Scott, is that this is a two-edged
11 sword. And I say "maybe" if it goes through the percipient
12 witness. If the percipient witness knows about Mr. Govey's
13 past, which I assume Agent Beeman did -- Investigator Beeman
14 did, then I agree with you. You got to take the good and the
02:26PM 15 bad.

16 And that's what I was trying to tell Mr. Scott is he's got
17 a decision to make. Because if Agent Beeman -- excuse me,
18 Investigator Beeman is this link to the informant scandal and
19 to Mr. Govey and the motive and bias, then what he's doing,
02:26PM 20 what he knows, what he says, it's all relevant for the motive
21 or bias. And it would seem to me if Investigator Beeman is
22 recommending to the feds that they take the case, he probably
23 knows who Mr. Govey is, and he probably knows about his
24 background.

02:27PM 25 And whether it's true or not doesn't matter. That's his

1 frame of mind. That's what he's thinking. So it's not being
2 offered for the truth, it's being offered to show motive, bias,
3 impact on the listener. So I agree with you, it comes in,
4 including punishment.

02:27PM 5 MR. MARRETT: And so let me back up a second, Your
6 Honor, because as far as -- you know, the government's not
7 going to be calling Investigator Beeman in its case in chief.
8 He's not actually a percipient -- I understand the defense
9 intends to call him, but he's not a percipient witness to the
02:27PM 10 search, to the recovery of the evidence which is being charged
11 in this case. And so --

12 THE COURT: You can't split hairs that way. He was
13 called to the scene. Why was he called to the scene? Why was
14 he at the scene? He talked to Mr. Govey. He has a right to
02:27PM 15 call him. I can't -- I'm not going to exclude him.

16 MR. MARRETT: Understood, Your Honor. I think what
17 is -- I mean, what I'm trying to at least make a record on,
18 Your Honor, is Deputy Larson, the other deputies that were in
19 the room that conducted the search, that went to the house for
02:28PM 20 the probation check, the reasons they went to the house, the
21 evidence that they recovered and found, that's the prosecution
22 in this case. Those are the facts that go to the defendant's
23 guilt.

24 Investigator Beeman's presence happens after all of that
02:28PM 25 during interviews at the house. And if he's brought in -- it

1 sounds like perhaps this is what the defense is suggesting --
2 that he's brought in solely to further a prosecution against
3 Mr. Govey. That goes directly to and solely to a motive for a
4 vindictive prosecution. If that's the defense's theory, that
02:28PM 5 needs to be raised in a pretrial proceeding and not presented
6 to the jury at trial because that -- it's an improper purpose
7 to -- for calling Investigator Beeman to testify solely about,
8 well, why was this case brought against Mr. Govey? Why was it
9 referred to the federal government? Is it because there's more
02:29PM 10 severe sentences? That's all that I anticipate
11 Investigator Beeman would be able to testify about. Because
12 all the other evidence and facts he wasn't present there for,
13 he wasn't part of the search. He's not part of any of the
14 evidence of defendant's guilt in this case. And so although
02:29PM 15 he's percipient in the sense that he was at the scene that
16 day --

17 THE COURT: And he talked to Mr. Govey in connection
18 with this case.

19 MR. MARRETT: And he talked with Mr. Govey in
02:29PM 20 connection with this case. But none of that is being put in
21 the government's case in chief to prove the defendant's guilt.

22 THE COURT: I understand that. I understand that.
23 But what -- I'm frustrated because I don't seem to be clear
24 with you is you get to call your witnesses; defense gets to
02:29PM 25 call their witnesses. And as long as Investigator Beeman is on

1 the scene and talking to Mr. Govey in connection with this
2 case, he is a percipient witness and they have the right to
3 call him.

4 MR. MARRETT: And, Your Honor, I'm not trying to
02:30PM 5 argue against you. I'm making my record. I think -- you know,
6 I understand what the Court's ruling is, and I'm not trying to
7 frustrate the Court.

8 THE COURT: No, I guess you will not frustrate me as
9 long as you convey to me that it is clear what I'm trying to
02:30PM 10 say, and if I'm not, please tell me, because you need to talk
11 to your witnesses. And I don't want them volunteering any of
12 the information that shouldn't be coming out. And I'm hoping
13 at the end of today at least we have an understanding of what
14 the lines are. And I'm going to be the first to say the lines
02:30PM 15 might be difficult. And the line that I'm trying to draw here
16 is percipient witness.

17 If it's a percipient witness, both sides can deal with the
18 motive/bias issue. And if that involves the informant scandal,
19 so be it. If that involves punishment, so be it. If that
02:31PM 20 involves Mr. Govey's 2012 case in State Court, so be it. But
21 what we're not going to do is call witnesses that have no
22 percipient knowledge about anything to do with this case.

23 Even though they might have a lot to do with the informant
24 scandal or individuals other than Mr. Govey or the federal
02:31PM 25 investigation, we're not going to have a *Dekraai 2*. We're not

1 here to try the informant scandal, the DA's office or the
2 sheriff's department. That's not the purpose. But if there's
3 any witness who has percipient knowledge and has a motive or
4 bias against Mr. Govey, he's going to have -- that's going to
02:31PM 5 have to be talked about by both sides.

6 MR. MARRETT: And I think I understand what the
7 Court's saying. I think it's clear the Court's ruling on that.

8 THE COURT: Okay.

9 MR. MARRETT: The other -- I did want to touch
02:32PM 10 briefly on the point about the punishment and sentencing --
11 potential sentence in this case. And I think, you know, as we
12 put forth in the brief, I think as a general matter the law's
13 pretty clear that that's not relevant. It shouldn't be put in
14 front of the jury.

02:32PM 15 To the extent that the defense's argument is that this
16 goes to motive because they know that in federal cases there
17 are more severe punishments, I think that could be said for
18 almost any case that's adopted from the State prosecuting
19 agencies by the federal government. And I think that it's a,
02:32PM 20 you know, dangerous precedent to be setting, that that's motive
21 evidence that comes in every single case.

22 THE COURT: But if that is the motive or one of the
23 factors that Investigator Beeman was thinking about when he was
24 supposedly recommending that the feds prosecute Mr. Govey, if
02:33PM 25 the defense want to bring that out, again, it's a two-edged

1 sword, but they're free to do that because that played a role
2 on why he did what he did. And like I said, it's a two-edged
3 sword.

4 Maybe the jury's going to like Investigator Beeman. Maybe
02:33PM 5 they're going to say, you know, "Good for you. You made that
6 recommendation." And that's the concern I have for Mr. Govey
7 is, you know, I could see this helping his cause and
8 discrediting the credibility of the government's witnesses or
9 the percipient witnesses, but it could also backfire where they
02:33PM 10 like Investigator Beeman. I mean, I don't know. But that's
11 not my call. That's going to be the jury's call. I just have
12 to make sure that everybody has a fair shot at this, so to
13 speak, and that any motive or bias of any percipient witness is
14 exposed. That's as simple as that to me.

02:34PM 15 MR. MARRETT: Okay. So this was the last one is the
16 motion in limine regarding the brass knuckles. So I think -- I
17 want to be clear because when the Court was discussing its
18 tentative, it was focusing on the piece of the intent to
19 distribute element.

02:34PM 20 The cases that we cited in the opposition that we filed
21 with the Court, a number of them talk about weapons being
22 circumstantial evidence of intent to distribute. Some of the
23 cases talk specifically about brass knuckles or other types of
24 weapons that aren't just semiautomatic pistols. And the
02:34PM 25 government's position is that the brass knuckles are indicative

1 of something that people distributing drugs use, and it
2 demonstrates an intent on the part of Mr. Govey to distribute
3 the drugs that he had in his possession.

4 THE COURT: Mr. Marrett, you're walking a real
02:35PM 5 dangerous line. I mean, you know what circuit we're in? They
6 are very critical. And I've had some recent cases where
7 they've been critical of what you get in through experts. And
8 judges in this courthouse have been reversed with experts. You
9 got to be very careful what you try to get in through an
02:35PM 10 expert.

11 And, you know, again, usually in the cases that I've had,
12 we're dealing with much greater quantities. And there's a
13 weapons charge in addition to the drug charge. So that
14 evidence about the weapon and laser scopes and everything,
02:35PM 15 that's coming in.

16 You're trying to -- I -- it just is -- it's not passing my
17 smell test. The brass knuckles is you're just trying to dirty
18 up Mr. Govey. And I'm quite frankly surprised and, to a
19 certain extent, disappointed that a federal agent would say
02:36PM 20 he's a drug dealer because he's got brass knuckles.

21 I don't know if you're aware, but there was an e-mail that
22 just came around that they were -- there was two jurors within
23 the last week or two weeks in Los Angeles, they had brass
24 knuckles that were detected and withheld at the scan by
02:36PM 25 security. I've seen brass knuckles in a life before this job.

1 It's -- a lot of people have them. They're not supposed to
2 have them. It's illegal to have them. But that is your
3 evidence that Mr. Govey is a drug dealer; he had brass
4 knuckles?

02:37PM 5 MR. MARRETT: Well, of course, that's not our only
6 evidence, Your Honor. And I think -- first of all, I want to
7 be clear that it's not coming in through our expert. I mean,
8 this is evidence that was recovered in the room. It will come
9 in through the deputies testifying that they seized it as part
02:37PM 10 of the evidence in the case.

11 THE COURT: Not if I say -- well, first of all, the
12 motion was -- at least it was teed up with me is that
13 Agent Paris was going to say that this is indicia of drug
14 distribution, and I say "no." And if it's not coming in
02:37PM 15 through the agent, you're saying now, "When we search, this is
16 the stuff we seized," I'm not inclined to allow you to even say
17 anything of that, nor am I inclined to allow you to talk about
18 the white supremacist's writings and box and stuff. Because
19 again, that's going to be character evidence.

02:37PM 20 MR. MARRETT: Well, I think -- let me talk about
21 these two things separately because I think what the expert is
22 going to testify is that weapons are a common tool used by drug
23 traffickers to either protect their drugs or to enforce their
24 drug debts. And in argument, we'll be able to argue that the
02:38PM 25 presence of weapons in this case is circumstantial evidence of

1 defendant's intent to distribute the drugs that he possessed.

2 And I think that's a completely fair and correct argument
3 to make that wouldn't be reversible error under the
4 Ninth Circuit even. And so it is probative of the defendant's
02:38PM 5 intent in this case. It's one of the circumstantial pieces of
6 evidence that go to proving the defendant's intent.

7 Separately the box on the outside, it has defendant's
8 moniker written on it. On the inside it had the brass knuckles
9 found. And on the bottom of the inside it has his name, and it
02:38PM 10 has the reference "White Power" on it.

11 THE COURT: But first of all, I think it's very
12 prejudicial if -- if Mr. Govey contests possession of the meth,
13 you and I would probably be on the same page. But you have no
14 dispute over ownership and possession of the meth. Since you
02:39PM 15 have no dispute about that, what -- I just find it not that --
16 that's the best evidence that he's distributing drugs? He has
17 brass knuckles? I would say the more logical inference is he's
18 protecting his own drugs if he wants to use them. He doesn't
19 want anybody else trying to take them. Or he's using them for
02:39PM 20 other activities dealing with any gangs that he's affiliated
21 with.

22 And why I raise that is it's not for me to weigh the
23 strength of the evidence, but I have a 403 call. And that is
24 just jumping out at me that this is -- could be used by the
02:40PM 25 jury for improper character purposes.

1 So again, I'm inclined to keep out the "white supremacist"
2 language, "evil," "666," "brass knuckles" on 403 grounds,
3 because I think it's going to be very difficult, if not
4 impossible, for the jury to use it for proper purposes and not
02:40PM 5 improper character purposes.

6 And again, I reiterate, you respectfully disagree with me,
7 and it sounds like you think I'm out to lunch here, but I'm
8 having a hard time believing a federal agent with DEA is going
9 to come into this court and say he's a drug dealer because he
02:40PM 10 had brass knuckles. I don't know what his experience is, but I
11 can -- I've seen brass knuckles thousands of times in life and
12 as a judge. And it's not -- very rarely have I seen brass
13 knuckles with drug cases.

14 I've seen brass knuckles with gangs. I've seen brass
02:41PM 15 knuckles with white supremacist organizations. I've seen brass
16 knuckles in theft cases. I've seen brass knuckles in
17 assault/battery cases. I mean, I can go on and on. It's not
18 unique to drug distribution cases.

19 MR. MARRETT: Well, Your Honor, I do want to go back
02:41PM 20 to one thing that you had mentioned is that the defense is not
21 challenging possession of the methamphetamine in this case.
22 The defense, at least to my understanding, is challenging
23 possession of other items in the room including the computer
24 that was in the room, which is part of the evidence in -- that
02:42PM 25 the government's going to offer in the case as to the second

1 count in the Indictment. And so there is still a dispute over
2 possession of items in the room.

3 The box, the fact that it contained personal effects that
4 the defendant had brass knuckles, has his name written all over
02:42PM 5 it. That's relevant to establishing possession of all the
6 items in the room.

7 THE COURT: Well, so would the drugs. If you have
8 the drugs, which you say is a large enough quantity for serious
9 distribution, right, why do you need a frickin' box with his
02:42PM 10 initials on it? And I don't see -- again, it's a 403 balancing
11 for me. You know, maybe it has some minimum probative value.
12 I'm not fighting you on that. What I'm fighting you on is it
13 has undue prejudicial effect. And it's just bringing character
14 evidence front and center.

02:43PM 15 MR. MARRETT: So I think, No. 1, as far as the brass
16 knuckles themselves, I don't think there's anything inherently
17 prejudicial about brass knuckles. The jury -- the Court can
18 give the jury a limiting instruction that they're only to be
19 used for the purposes of determining defendant's intent in this
02:43PM 20 case or defendant's possession of other items in the room.

21 And as to the box itself, I think, you know, part of the
22 probative value here, Your Honor, is although they're not
23 distributing the possession of the drugs, although there are
24 other -- a few other items in the room with his name on it, he
02:43PM 25 is challenging the possession of the computer in the room. So

1 it's the collective value that all of the other items found in
2 the room are his. It makes it more probative or more likely
3 that the computer was also his.

4 And so that's -- it's not just the probative value, the
02:43PM 5 piece by itself, but it's the collective probative value that
6 all the other evidence points to the computer and the other
7 items in the room belonging to him.

8 THE COURT: Well, we'll hear what Mr. Scott has to
9 say. I guess I've argued enough with you.

02:44PM 10 MR. MARRETT: All right. Thank you, Your Honor.

11 THE COURT: Okay. Mr. Scott.

12 MR. SCOTT: Thank you, Your Honor. I'll try to
13 maintain sort of the same order that the Court laid out and
14 focus on the things that I think are still of concern or in
02:44PM 15 dispute as far as I'm concerned. And I say that without
16 suggesting that the Court has said anything other than the
17 tentative rulings. I'm not being presumptuous in terms of
18 finality, but at the same time I don't want to snatch defeat
19 from the jaws of victory. So I want to steer my comments
02:44PM 20 around things where I think I ought to.

21 In terms of Agent Paris and the *Daubert* hearing, I would
22 start by saying that I agree with the Court insofar as I think
23 based on the experience and training that's been laid out in
24 the papers, that this agent should be able to testify about
02:45PM 25 things like pay/owe sheets and packaging and common tactics and

1 so forth. I think that's -- you know, I can cross-examine on
2 that. I may or may not agree with his conclusions, but I think
3 that's fair game in the battle of the experts.

4 The specific concern -- and I also agree with that legal
02:45PM 5 line, although I think it's sometimes easier to say than it is
6 to perform in court that line in terms of him saying, "This is
7 a personal use amount," or "This is a distributable amount."
8 Certainly it would be on the wrong side of the line, I think,
9 for him to say the drugs that Mr. Govey had in this case were
02:45PM 10 clearly for distribution. I think that everyone is sort of on
11 the same page that that's across the line.

12 THE COURT: I'm not sure we were all on the same
13 page. You and I are on the same page.

14 MR. SCOTT: Some of us are. And again, I say that
02:46PM 15 not to be at the expense of Mr. Marrett, but I think what I'm
16 hearing and my argument certainly is that that would be on the
17 wrong side of the line at least in terms of the Court's
18 tentative.

19 THE COURT: Yeah. And Mr. Marrett's a big boy, he
02:46PM 20 can take the criticism as I can take the criticism. I was only
21 trying to belabor the point because he needs to talk to his
22 expert and I don't want this to come out. I want him staying
23 away from the evidence that was seized in this case. Because
24 then he's doing the jury's job or he's doing his job in closing
02:46PM 25 argument. He's got to connect the dots.

1 MR. SCOTT: So here's where it gets a little bit
2 trickier. If we assume that that first part is clearly on the
3 wrong side of the line, I can envision it not being too
4 difficult for an experienced agent to do a pretty simple end
02:46PM 5 run around that concern and say, "Well, let me give you a
6 hypothetical where there's 37.7 grams" --

7 THE COURT: There's going to be no hypotheticals.

8 MR. SCOTT: Okay.

9 THE COURT: I'm interrupting you because I agree
02:47PM 10 with you, I'm not going to allow that, and you need to object.
11 No.

12 MR. SCOTT: Okay.

13 THE COURT: He's only going to testify about his
14 experience and if there is some -- okay, "What is the typical
02:47PM 15 amount that you see dealers sell to users? And what is the
16 least amount that you've seen a dealer distribute or have in
17 his or her possession? And what is the largest amount?" And
18 you'll probably ask the opposite, "What is the largest amount
19 you've seen a user possess for his or her own personal use?"
02:47PM 20 Those questions are fair.

21 MR. SCOTT: So here's where it gets a little
22 trickier. So I'm glad we at least resolved the hypothetical
23 issue. I think it gets a little trickier because I'm trying to
24 learn about Agent Paris. And I read some of his prior
02:48PM 25 testimony. And from what I've seen, it often goes something

1 along the lines of, "Agent Paris, let me ask you this: What
2 would you consider a personal use amount of narcotics?"

3 And then he says something to the effect of, "Well, the
4 DEA considers as much as a 20th of a gram to be a personal use
02:48PM 5 amount. That's one dose, like if a doctor were to prescribe
6 you amphetamines for weight loss, let's say. But what I do in
7 the subtext is, you know, just to be very fair and conservative
8 is I allow for tolerance and addiction and, you know, the need
9 to get high. So I'm going to say a tenth of a gram is a
02:48PM 10 personal use amount. That's one dose."

11 And then it sort of cascades into the math, "Well, how
12 many grams are in an ounce?"

13 "Well, there's 28 grams in an ounce," and then it goes on.
14 So this many grams would be, you know, thousands and thousands
02:49PM 15 of doses.

16 The concern I have specifically with that, and I'm trying
17 to cabin this to this specific testimony, "The DEA says 1/20th
18 of a gram; I say it's 1/10th of a gram."

19 "Well, where do you get that from?"

02:49PM 20 I think that it would be a closer call, and, in fact, I
21 think it's probably legitimate for him to say, "I've
22 interviewed a thousand drug users, addicts, and they tell me,
23 'I smoke a tenth of a gram a day,' or 'I smoke a tenth of a
24 gram at a time.'" So be it.

02:49PM 25 In fact, we've proposed a counter expert who's an

1 addiction therapist to combat that kind of testimony to say,
2 "You know, in my experience, you know, regular heavy users tend
3 to -- they can use several grams a day easy. That happens all
4 the time." And I think that's fair game obviously. But to say
02:50PM 5 because doctors prescribe amphetamines in 1/20th of a milligram
6 capsules, and I'm just going to double that to be fair, I don't
7 think that that passes muster under *Daubert* for the street use
8 of methamphetamine to get high and then to use that as a
9 springboard into the argument that obviously this was for
02:50PM 10 distribution, because it's so much higher than that.

11 THE COURT: I'll give Mr. Marrett a chance to
12 respond, but I agree with you. And I'm not agreeing with you
13 quickly. I was thinking the exact same thing. I thought that
14 would be another area where I think we need to stay out of. Or
02:50PM 15 my other option is I'm going to have to bring you back here and
16 we're going to have to have a *Daubert* hearing. And I was
17 hoping to avoid a *Daubert* hearing because I think at the end of
18 the day I'm going to have to exclude it.

19 If Mr. Marrett is adamant about asking the agent those
02:51PM 20 questions, then we'll have to have a *Daubert* hearing. But I'm
21 parroting what you said because I thought the same thing, is if
22 it's based on his own personal observations, it's okay. But if
23 it's just some part of a DEA manual, or it's just what
24 prescribed doses of legal prescriptions are, that doesn't seem
02:51PM 25 to me to be a reliable method or practice, and I don't think it

1 would survive the *Daubert* challenge.

2 But if the government isn't willing to agree to that,
3 we'll have to have a *Daubert* hearing and we'll have to schedule
4 it and see where it goes. But my hope is that we don't have
02:51PM 5 to.

6 MR. SCOTT: Well, consistent with the maximum that I
7 said at the beginning, I'm going to move on, then, from that
8 topic and go to the vindictive prosecution argument. And I
9 just want to make clear, and I think the Court was alluding to
02:52PM 10 the same questions to Mr. Marrett, my theory is not that this
11 case should be dismissed for vindictive prosecution, that this
12 is like a Rule 12 motion.

13 And I'm not accusing Mr. Marrett of himself having some
14 sort of animus against Mr. Govey or even necessarily
02:52PM 15 United States Attorney's Office having an animus against
16 Mr. Govey. Those would be legal issues. This is the factual
17 issue against Investigator Beeman and Bryan Larson. Anything
18 that I'm going to try to do is related to these witnesses.

19 But as the Court correctly pointed out, that may include
02:52PM 20 me talking about their motivations. And I am mindful -- you
21 know, these are difficult calls to make -- I am mindful of the
22 Court's, you know, caution or suggestion that, you know, it
23 could be dangerous waters getting into the minimum mandatorys
24 and things like that. So I accept that. And if I go there,
02:53PM 25 then I guess the record will reflect it's with eyes open.

1 THE COURT: Okay.

2 MR. SCOTT: So I do appreciate that.

3 What I am going to try to avoid, though, because I think
4 the Court makes a great point, I don't necessarily think it's
02:53PM 5 to Mr. Govey's benefit to spend a great deal of time talking
6 about the Aryan Brotherhood and Public Enemy Number One and
7 swastikas. I think with some focus and precision on my part --
8 and it's my responsibility to do that, I think I can still
9 present evidence of some bias on the sheriff's part and the
02:53PM 10 portions of the jail incidents that relate to Mr. Govey alone,
11 not the *Dekraai* 2 or 3, but as it relates to Mr. Govey and his
12 involvement with these deputies. I think I can do that in a
13 way that doesn't lead me to be talking about gangs and white
14 supremacy and all that.

02:54PM 15 You know, if it's some point I open the door and the
16 government can persuade the Court that I have opened the door,
17 then so be it, but I want to state my intention at the
18 beginning that certainly, you know, I'm not going to leave my
19 chin on that issue, and I'm going to do my level best to stay
02:54PM 20 short of that line even if reasonable minds may differ on where
21 that line is.

22 So I'm basically complying with the Court's request before
23 that I should be clear about my strategies, vis-à-vis gangs or
24 no gangs beforehand. So I'm trying to say I'm not planning on
02:54PM 25 getting into gangs. If I cross the line, I cross the line.

1 But I'm not trying to.

2 THE COURT: And I do appreciate that. But for
3 planning purposes, Mr. Scott -- and I understand your position,
4 and I say that respectfully -- I do understand what you're
02:54PM 5 doing. But for preparation, I've got to determine how do I
6 deal with this issue, if at all, during jury selection,
7 preliminary instructions. It seems to me even with your
8 strategic -- your hopeful strategic questioning of just two
9 witnesses on this subject, if the evidentiary hearing we had
02:55PM 10 with Deputy Larson was any indication, the Aryan Brotherhood,
11 Public Enemy Number One is going to come up.

12 I feel since it's going to come up, I need to tell the
13 jury something about that. I have -- just to put it on the
14 table now, I have a proposed instruction that I would give, and
02:55PM 15 I'm not wedded to this. What I'm wed to is I think I have to
16 say something to the jury on that. Because when they hear
17 "Aryan Brotherhood" or they hear "white supremacist gang" and
18 they hear a person from law enforcement saying Mr. Govey's part
19 of that or is involved with that, that's not good for him. And
02:56PM 20 I want to make sure that this jury does not use that for
21 character purposes.

22 So what I was going to propose, and I'll read it real
23 slow, this would be during jury selection, but we would dupe
24 and revise it for the instructions before, during and after the
02:56PM 25 case. (Reading:)

1 "If on the jury, you may hear evidence
2 regarding Public Enemy Number One, the Aryan
3 Brotherhood and other street or prison gangs, you
4 may consider this evidence only for the limited
02:56PM 5 purpose of determining whether any witness from the
6 Orange County Sheriff's Department has a bias or
7 motive against the defendant in determining the
8 credibility and believability of that witness. You
9 may not consider this evidence for any other
02:56PM 10 purpose.

11 "It is not a crime for a person to be a
12 member of a gang or to be associated with a person
13 who is a member of a gang; therefore, if a
14 juror" -- "therefore, if a juror, you may not
02:57PM 15 conclude from this evidence that any" -- "that the
16 defendant is a person of bad character because of
17 such membership or association, or that the
18 defendant has a disposition to commit any of the
19 crimes charged in the First Superseding Indictment
02:57PM 20 because of such membership or association."

21 I'm -- you want me to read it again?

22 MR. SCOTT: Sure. Maybe one more time.

23 THE COURT: It's handwritten because I just came up
24 with it before I took the bench because you guys were hitting
02:57PM 25 me with a lot of stuff last minute. (Reading:)

1 "If on the jury, you may hear evidence
2 regarding Public Enemy Number One, the Aryan
3 Brotherhood and of other street or prison gangs,
4 you may consider this evidence only for the limited
02:58PM 5 purposes of determining whether any witness from
6 the Orange County Sheriff's Department has a bias
7 or motive against the defendant in determining the
8 credibility and believability of that witness. You
9 may not consider this evidence for any other
02:58PM 10 purpose.

11 "It is not a crime for a person to be a
12 member of a gang or to be associated with a person
13 who is a member of a gang; therefore, if a juror,
14 you may not conclude from this evidence that the
02:58PM 15 defendant is a person of bad character because of
16 such membership or association or that the
17 defendant has a disposition to commit any of the
18 crimes charged in the First Superseding Indictment
19 because of such membership or association."

02:59PM 20 MR. MARRETT: At the risk of taking Mr. Scott's time
21 from him, the only concern that the government has with that
22 instruction is the reference to Orange County Sheriff's
23 Department specifically. But to the extent that the Court
24 gives the instruction, the government would ask that it just
02:59PM 25 say "any witnesses" generally.

1 THE COURT: I don't have a problem with that.

2 MR. SCOTT: I actually agree with that, believe it
3 or not.

4 THE COURT: Okay. Any witness -- okay. (Reading:)

02:59PM 5 "You may consider this evidence only for the
6 limited purposes of determining whether any witness
7 has a bias or motive against the defendant in
8 determining the credibility and believability of
9 that witness. You may not consider this evidence
02:59PM 10 for any other purpose.

11 "It is not a crime for a person to be a
12 member of a gang or to be associated with a person
13 who is a member of a gang; therefore, if a juror,
14 you may not conclude from this evidence that the
03:00PM 15 defendant is a person of bad character because of
16 such membership or association or that the
17 defendant has a disposition to commit any of the
18 crimes charged in the First Superseding Indictment
19 because of such membership or association."

03:00PM 20 Good?

21 MR. MARRETT: Yes.

22 MR. SCOTT: Here's my thought, Your Honor. I agree
23 with the change as to the sheriff and making it more general.
24 I would ask at the risk of this being surplusage, I would like
03:00PM 25 it to say, "You may or may not hear evidence of Aryan

1 Brotherhood and" --

2 THE COURT: Okay.

3 MR. SCOTT: I mean --

4 THE COURT: I don't have a problem with that.

03:00PM 5 MR. SCOTT: I guess that's implicit in the word
6 "may," but I kind of like that better.

7 THE COURT: Okay. "If on the jury, you may or may
8 not hear evidence."

9 MR. SCOTT: And I understand why the Court proposes
03:01PM 10 it, but, you know, to the extent that it's Mr. Govey's
11 prerogative, if it is, my suggestion would be starting with "It
12 is not a crime" down. I would ask that we sort of take that
13 part of it under advisement. And if there comes a time during
14 the trial when evidence actually comes in and actually
03:01PM 15 suggests, you know, that that is -- that is the state of
16 affairs as to Mr. Govey, then we consider whether we want to
17 give it then.

18 The reason I say that is I think the -- I think the
19 research and trial dynamics suggests that what you spent a lot
03:01PM 20 of time talking about in voir dire gives certain signals to the
21 jury. My concern is that the subtext is that the jury will
22 instantly say, "Okay, I get it. Mr. Govey is a white
23 supremacist," or "I get it. Mr. Govey is a PENI or Aryan
24 Brotherhood member," and that will set -- you know, as a -- I
03:02PM 25 think hopefully was demonstrated at the last court date, I

1 think there's some dispute about that. Certainly Mr. Govey
2 doesn't admit.

3 THE COURT: And I understand that.

4 MR. SCOTT: So maybe I'm overtalking this, but I
03:02PM 5 would prefer not to have everything from "It's not a crime"
6 down, because it sort of suggests that it's a subtle issue.
7 Not intentionally, but that's the subtext that Mr. Govey is, in
8 fact, a gang member.

9 THE COURT: First of all, I am very open to getting
03:02PM 10 rid of it, especially if -- this whole instruction is for
11 Mr. Govey. And if you don't want it, of course I'm going to do
12 that. And I'm not trying to sell you, I'm just trying to
13 explain my position.

14 In cases that I've had dealing with gangs, and Mr. Tenley
03:02PM 15 is in the audience, we had one just recently with him dealing
16 with the Bloods, gang evidence is a hot topic. Most people are
17 familiar with them. To my knowledge, in my experience, most
18 people are -- a lot of people are familiar with Public Enemy
19 Number One or the Aryan Brotherhood. And most, but not all,
03:03PM 20 that's not a positive thing. And I -- I'm concerned about
21 that. For Mr. Govey's perspective is I don't want to sugarcoat
22 it, I want to hit it head on.

23 In the case that I had with Mr. Tenley dealing with the
24 Bloods, the defense lawyers were very adamant with me that that
03:03PM 25 be in there because they wanted to really have some comfort

1 that any juror on this case is not going to use that against
2 their client. And if it's not hashed out and brought front and
3 center, then you won't know that.

03:04PM 4 You know, it's very seldom that you're going to get any
5 person, Mr. Scott, to say, "Yeah, I have a bias against the
6 Bloods. I have a bias against the white supremacists." And if
7 people have very strong, negative feelings about Public Enemy
8 Number One, the Aryan Brotherhood, you need -- Mr. Govey and
9 you need to know that. And unless you talk about it, you're
03:04PM 10 not going to know that.

11 So again, I don't want to come off like I'm trying to
12 convince you to keep it in, I'm just trying to say, you know,
13 if this is an issue for people, unless you bring it up and you
14 hit it head on -- because that language says, "You can't use
03:05PM 15 this against him. Are you going to have a problem with that?"
16 Because if you are, you need to tell me now. You need to tell
17 the lawyers now.

18 "Well, you know, actually I am. They scare me. And if
19 Mr. Govey is associated with it, he scares me." That's not a
03:05PM 20 juror you want.

21 MR. SCOTT: Well, I agree and I appreciate the Court
22 articulating that. I do think that we -- I do think that it's
23 worthwhile to explore this. I guess my thinking was that by
24 raising this at all, that's certainly -- I hope we'll begin to
03:05PM 25 kind of begin that conversation and smoke out some of these

1 issues in a jury selection. I was just concerned -- as I said,
2 I was concerned about it being a foregone conclusion that he,
3 in fact, was or is, you know, a member of either of these
4 organizations. Because I don't know that the evidence supports
03:06PM 5 that or -- and certainly it will be disputed evidence if that
6 was.

7 THE COURT: Well, like I said, I'm not even going to
8 try to talk about it. I think we should add "may or may not."
9 The more neutral and objective that we can do it, the better.
03:06PM 10 Again, it's that bracketed language you want me to put in
11 brackets. I'm just worried to seriously address this issue,
12 you're going to need to inquire.

13 And then I don't want the whole jury pool tainted, so I
14 want to make it -- you know, what makes this country great is
03:06PM 15 we do have that First Amendment. And Mr. Govey and all of us
16 have a constitutional right to associate with whoever we want,
17 and that cannot be used against him. And I like to think most,
18 but not all, most people buy into that. But there are some
19 people that don't. And if one of those people who doesn't buy
03:07PM 20 into this is in that box, I think we all need to know it. And
21 I say "all," even though it's going to be prejudicial to
22 Mr. Govey, the government has to have a good record, and I want
23 to make sure I do my job.

24 MR. SCOTT: Well, the Court had proposed some pretty
03:07PM 25 strong language in terms of not holding this against, you know,

1 Mr. Govey or only using it in certain ways. What if it was,
2 you know, "any party or witness" or words to that effect?

3 THE COURT: I just don't know if we can do it that
4 way because the concern is, and you'll see the model
03:08PM 5 instructions, is the prejudice against the defendant. You
6 know, I'm not worried about a prejudice against the government.

7 MR. SCOTT: My thought is that we can still remove
8 the, you know, "it's not a crime" and all that, but just ask if
9 people have very strong feelings. Or if they do hear evidence
03:08PM 10 and we don't yet know what if any evidence it will be, is this
11 going to -- does anyone have strong emotional reactions, is it
12 going to be difficult for them to sit on this case? We can do
13 all the regular things without directly suggesting that, in
14 fact, Mr. Govey is in this situation himself.

03:08PM 15 THE COURT: Well, why don't we just table it for a
16 few minutes. Why don't we talk about any other issues you
17 have. I don't think you addressed the brass knuckles or what I
18 call the gang markings. You call them prejudicial markings,
19 but I think it's the white supremacist or gang.

03:09PM 20 MR. SCOTT: Yeah, I don't know if I have a great
21 deal to add about the brass knuckles on the papers. I would --
22 you know, one thing I would point out under our 403 analysis is
23 it strikes me, at the risk of being cynical, that if this was
24 so probative and so helpful, I would have expected that we
03:09PM 25 would have seen it in the government's initial 404(b) motions

1 where they did move affirmatively to admit a number of other
2 documents, and I would have expected to see it in Agent Paris's
3 initial Rule 16 disclosure.

4 It sort of smacks as -- it smacks of the notion that, you
03:09PM 5 know, the priors didn't come into evidence, and so now there's
6 a stretch for the brass knuckles. Maybe I'm being cynical, but
7 that's how it looks and that's how it appears to the defense.
8 So I think if nothing else under 403, it should be excluded.

9 In terms of -- you know, in terms of his name, Joey Govey,
03:10PM 10 I think -- we're not disputing that there's any number of
11 different items that do belong to him in that room. And so I
12 think the additional probative value of the brass knuckles
13 themselves are some of these inflammatory markings I don't
14 think withstand a 403 analysis.

03:10PM 15 THE COURT: Are you going to be disputing that he
16 occupied the room?

17 MR. SCOTT: No, his stuff was in there. His jacket
18 was in there. No, we're not going to dispute that.

19 THE COURT: Okay.

03:10PM 20 MR. SCOTT: I think that's a different thing in
21 saying that every single thing that was in that room belonged
22 to him.

23 THE COURT: Specifically the computer?

24 MR. SCOTT: Yeah, there is going to be a fight about
03:10PM 25 the computer. And I'll say right now, too, there's not going

1 to be a fight that he possessed individual bills too. That
2 just is what it is. It was in his wallet. He was arrested on
3 a different occasion within (sic) his wallet. I think that's
4 different than saying that he was the person that was
03:11PM 5 manufacturing them frankly. So I think that's where more the
6 dispute is going to be rather than "I didn't know there was any
7 bills in here" type of defense.

8 With that, I wanted to -- so I don't want to get ahead of
9 the Court's list, we did want to provide sort of a discovery
03:11PM 10 update to the Court as much for the record as for anything
11 else, but that's what I have in terms of the Court's list right
12 now.

13 THE COURT: Okay. Well, Mr. Marrett, anything else
14 you want to add to these motions in the instructions?

03:11PM 15 MR. MARRETT: Just two points briefly, Your Honor.
16 I guess first as to the instruction, I think it's -- the
17 instruction is for the defense. I think it's, you know, their
18 call as to whether they want to have that in or not. I think
19 it is appropriate to have it in there, but the government
03:12PM 20 doesn't have an objection to taking it out.

21 THE COURT: They want it out.

22 MR. MARRETT: If the defense asks for it, right.

23 THE COURT: Okay. Well, Mr. Scott, you want it out?

24 MR. SCOTT: Yes, Your Honor.

03:12PM 25 THE COURT: So then it's just going to be -- let me

1 read it so we're all in agreement, because this is going to
2 be -- I'm going to say this during jury selection. (Reading:)

3 "If on the jury, you may or may not hear
4 evidence regarding Public Enemy Number One, the
03:12PM 5 Aryan Brotherhood and other street or prison gangs,
6 you may consider this evidence only for the limited
7 purposes of determining whether any witness has a
8 bias or motive against the defendant in determining
9 the credibility and believability of that witness.

03:12PM 10 You may not consider this evidence for any other
11 purpose."

12 MR. MARRETT: Government has no objection to that
13 form of the instruction.

14 MR. SCOTT: Yes, Your Honor.

03:13PM 15 THE COURT: That's good. Okay. That's what I will
16 do during jury selection. It will also be the one that I will
17 give before trial. It will probably be the one that I give
18 during trial before this evidence comes in. And I will -- we
19 can talk about what the instruction should read at the end of
03:13PM 20 the case after we've heard all the evidence. And maybe this
21 evidence might -- maybe this language might have to be added if
22 we're concerned too much of it came in.

23 MR. MARRETT: Understood, Your Honor. So the other
24 two points that I wanted to address on the first -- the
03:13PM 25 defense's *Daubert* motion, I think defense is mischaracterizing

1 a little bit what I anticipate our expert's testimony to be. I
2 think that our expert will testify that his -- what he
3 understands to be a personal-use quantity is based on his
4 experience interviewing folks who have been arrested or who
03:14PM 5 have been cooperating witnesses or that have been confidential
6 informants. So I think it is going to be testimony from his
7 personal knowledge and training and experience.

8 I don't -- I think the defense is suggesting that he's
9 making some sort of inferential, just ad hoc double the dosage
03:14PM 10 amount, and I don't anticipate that to be what the testimony
11 is. And I'm not sure if the Court had another concern about
12 that type of testimony.

13 THE COURT: Well, I guess we'll just have to be --
14 what I was hoping is we could avoid a *Daubert* hearing. But
03:14PM 15 again, there's this one specific amount that if you are at that
16 or below, it's for personal use. And if you're above it, it's
17 for distribution. That, I'm having a problem with, because --

18 MR. MARRETT: No, I know.

19 THE COURT: -- that is totally inconsistent with my
03:15PM 20 knowledge and experience. I'm not a DEA agent.

21 MR. MARRETT: My thing is the testimony is not going
22 to be some bright line that if you have more than this amount,
23 it's always for distribution. If you have less, it's always
24 for personal use. I think it's going to be testimony about
03:15PM 25 what in his training and experience he sees as the type of

1 quantities that are personal-use-type quantities and the type
2 of quantities that are distribution-type quantities.

3 And I think, you know, my understanding is that this is
4 precisely the same type of testimony that the defense is
03:15PM 5 anticipating its expert to offer. So I'm not sure what the
6 defense objection is to that type of testimony. It's going to
7 be based on training, experience, interviews with the
8 arrestees, cooperating witnesses, confidential informants,
9 investigations, surveillance, those type of things.

03:16PM 10 THE COURT: Well, the way you just said it there, I
11 didn't have a problem with.

12 Mr. Scott, do you have a problem with the way he said it?
13 Sounds like he's saying he's going to do the opposite -- I mean
14 have the opposite testimony, but on -- in the exact same format
03:16PM 15 that you were planning with your expert.

16 MR. SCOTT: Well, I can tell you what I read in
17 terms of testimony and other cases. And I can represent to the
18 Court that time and again the agent says, "Well, the DEA
19 considers 1/20th of a gram to be a standard dosage. But
03:16PM 20 accounting for tolerance and for addiction, my opinion is it's
21 1/10th of a gram."

22 Now whether at Mr. Marrett's behest this time, he will
23 say -- and this is based on me talking with a whole bunch of
24 addicts and users over the years, I suppose that's fine, but I
03:16PM 25 think we need to have that *Daubert* hearing to see where he's

1 actually obtained that information from. Because, you know,
2 again, he's -- I'm just relying on the transcripts I've read
3 already, he says, you know, a tenth of a gram is, in my mind, a
4 personal use amount.

03:17PM 5 I've even seen him testify on some occasions that in his
6 view people wouldn't really buy or have more than just a couple
7 uses at a time because it's easy to get meth. And so there
8 wouldn't be a reason to do that. I mean, I've seen him. It
9 depends on the outset, but I've seen him give that exact kind
03:17PM 10 of testimony. So I have my concerns, I'm trying to head it off
11 by making my record. And I think -- you know, I think we do
12 need to have a *Daubert* hearing if he's going to opine on what a
13 standard dose is or personal use at a time or in a day amount
14 is.

03:17PM 15 THE COURT: Okay. We need to schedule a *Daubert*
16 hearing, then. Do we want to do this during trial or do we
17 want to do it Monday?

18 MR. SCOTT: I'm at the Court's convenience. I'm
19 coming up here this weekend, so I'll be here. Whatever's good
03:18PM 20 for the Court.

21 MR. MARRETT: I'm going to have to confer with
22 Special Agent Paris to see what his availability is.

23 THE COURT: Okay.

24 MR. MARRETT: And, Your Honor, I would also --
03:18PM 25 because it does seem to me that this is -- that Special Agent

1 Paris's testimony is going to be the exact same testimony based
2 on the same type of experience-type bases as the defense's
3 expert. So I think if we're going to have a *Daubert* hearing
4 into the bases of these opinions, I think equally the defense's
03:18PM 5 expert should be subject to the same *Daubert* hearing.

6 THE COURT: That's fair. Okay. So it's going to
7 have to be mutual. And you sure you guys want to do this? I
8 mean --

9 MR. MARRETT: Well, Your Honor, I don't think a
03:18PM 10 *Daubert* hearing is necessary. I think that the bases for the
11 testimony are adequate. I think Special Agent Paris's training
12 and his experience investigating and arresting and interviewing
13 folks who both distribute and use methamphetamine, I think, is
14 an adequate basis to testify based on that experience what he
03:19PM 15 has seen as distribution versus personal-use quantities.

16 I'm not exactly aware of the precise testimony that
17 Mr. Scott is referring to in his prior cases, but I think there
18 is probably a context to it as to what was the question that
19 was asked, how far did the line of questioning go into what
03:19PM 20 were the bases for that opinion, "Is that an average opinion?"
21 "Is that an opinion about every single time that you've seen
22 it?" And I think we can explore that during the trial as to
23 what his bases for his opinions are, and I think that will, I
24 think, elicit that it's based on a proper training,
03:20PM 25 experience --

1 THE COURT: What's training -- I guess, but given
2 there's been a defense objection, I got to go through the
3 *Daubert*. I don't want to go through it, but I don't want
4 to mess up the record, create a record for appeal.

03:20PM 5 If what you're saying is true, I agree with you. But the
6 way Mr. Scott presented it earlier, it sounded like -- and
7 maybe this is unfair characterization, if it's doctors
8 prescribe 1/20th of a gram, and -- well, that's a legal
9 prescription, what the heck does that have to do with what
03:20PM 10 people use? You're commingling apples and oranges.

11 MR. MARRETT: And I don't think that -- and I want
12 to be clear, I'm not disputing that there may have been
13 testimony about that before because my understanding is that
14 the DEA does have -- methamphetamine is a Schedule II
03:21PM 15 substance. There are medical uses for it. There is a sort of
16 medically accepted dosage amount.

17 But I don't -- I don't anticipate that the medically
18 accepted dosage amount is going to be the basis for his
19 testimony as to what the street use amount is, which is, I
03:21PM 20 think that's the connection that Mr. Scott is suggesting
21 occurs. And my understanding is that Special Agent Paris's
22 testimony about what a street use amount is is going to be
23 based upon his training and experience and those bases.

24 THE COURT: All right. Well, Mr. Scott, you want a
03:21PM 25 *Daubert* hearing? You still think it's necessary?

1 MR. SCOTT: Yes, it is, Your Honor.

2 THE COURT: Both experts? All right. So we got to
3 schedule it. We don't have much time left. Do you want to do
4 it during trial or before?

03:22PM 5 MR. SCOTT: I'm happy to do it during trial if we
6 need to. Again, I know a lot of this is coming in and I do
7 appreciate the Court's patience. I hope I'm speaking for both
8 of us, we're kind of taking it as it comes on a short timeline
9 here. We're not trying to leave things at the last minute.

03:22PM 10 It's just -- I get it.

11 So like I said, I can do it Monday. I can do it after --
12 I don't want to burden the staff, but I can do it before jury
13 trial day, after the jury trial day, really whenever the Court
14 would like.

03:22PM 15 THE COURT: Okay. When were you planning on calling
16 Agent Paris?

17 MR. MARRETT: I suppose depending on whether we get
18 through more than one witness on Tuesday, I would anticipate
19 probably Wednesday afternoon.

03:22PM 20 THE COURT: So we need to do this, then, Monday
21 afternoon or Tuesday afternoon. So why don't you both confer.
22 Confer with your experts and see when we can do it.

23 **(Court and clerk conferred off the record.)**

24 THE COURT: Okay. So Monday at 3 o'clock or
03:23PM 25 Tuesday, what -- we'll pick the jury hopefully pretty early in

1 the morning. Hopefully by the end of the morning we'll have
2 our jury picked, and then we'll have one witness. So we'll
3 probably be breaking at no later than 4:30. So it's either
4 Monday at 3:00 or Tuesday, sounds like 5 o'clock.

03:23PM 5 MR. MARRETT: I'll confer with Special Agent Paris
6 and let the Court know as soon as possible. And will we be
7 doing the defense expert simultaneously, at the same time?

8 THE COURT: Or, you know, if you want to wait till
9 later when the defense is going to call its expert. But
03:24PM 10 hopefully, whatever we do for your expert, it's going to be the
11 same for the defense expert. I'm not going to restrict the
12 government's expert and then allow the defense to talk about
13 these things or raise them in. So it's going to be equal.

14 MR. MARRETT: Understood, Your Honor.

03:24PM 15 THE COURT: So I don't know how you want to proceed
16 that way. And I'm an optimistic guy. Maybe -- I still think
17 you should meet and confer on this. And I'm not saying you
18 have to script your entire testimony, but share with each other
19 the kind of questions you're going to ask and see if you can
03:24PM 20 resolve this. Because you're going to be tired, and I want you
21 focusing in on your questions and your opening statements and
22 your closing arguments as opposed to having to do two runs --
23 dry runs of your experts in the evening.

24 MR. MARRETT: Understood. I will speak with
03:25PM 25 Mr. Scott, see if we can resolve this in advance of that. But

1 otherwise, I'll let the Court know as soon as possible about
2 the availability of Special Agent Paris.

3 THE COURT: Right. Again, I stand by what I said
4 earlier. Each side's expert should be able to say based on
03:25PM 5 their experience and training, this is the amounts that is for
6 our personal use when you're doing it on any one given
7 occasion. And each can talk about, "Well, what's the lowest
8 amount of quantity of drugs that you've seen for distribution?"
9 "What's the highest amount of drugs that you've seen for

03:26PM 10 personal consumption? And explain that." Well, they don't
11 want to have to buy every time they take a hit or ingest it, so
12 they keep a supply. And they'll be able to explain what it is.

13 But if I'm hearing testimony from either expert that this
14 is based on scientific medical data, then I'm becoming very
03:26PM 15 suspect. Because I've done this a long time and my
16 understanding is it's not scientific, it's based on experience.
17 It's not a scientific medical principle.

18 MR. MARRETT: And I think I generally agree with
19 that, and I anticipate that's what our expert's testimony will
03:26PM 20 be. But I will meet and confer with Mr. Scott on it.

21 THE COURT: I appreciate it.

22 MR. MARRETT: The other point I wanted to bring up
23 is as far as the defense's ability to get into potential
24 punishment or the difference between federal and state
03:27PM 25 Sentencing Guidelines, with the witnesses for purposes of bias

1 or motive, the government would still ask that the Court
2 exclude any reference to specific punishments, the specific in
3 terms of imprisonment or potential specific punishments that
4 can be imposed. I think the defense can cross-examine the
03:27PM 5 witnesses for their bias based on their knowledge of, you know,
6 generally the differences between state and federal sentences
7 without referencing the specific sentences that might apply in
8 a federal versus state case.

9 THE COURT: I'm going to deny that with the
03:27PM 10 understanding that the witness in this instance, it sounds like
11 we're talking about Investigator Beeman, that he is aware of
12 what those mandatory minimums are and that played a factor in
13 his analysis purportedly recommending that the feds take the
14 case.

03:28PM 15 MR. MARRETT: Well, and just for the record, I want
16 to be clear, Your Honor, that we're making this motion also
17 under 403, that it's prejudicial evidence. It's potentially
18 misleading the jury as to what the punishment may be in this
19 case. And what's really probative as to what the Court is
03:28PM 20 suggesting is bias or motive is whether he knew there are
21 greater sentences in Federal Court versus State Court. Defense
22 can reference that without referencing the specific sentences.

23 THE COURT: I understand, but it's denied. Again,
24 assuming that this punishment in these Sentencing Guidelines
03:28PM 25 are mandatory minimums was something that Investigator Beeman

1 was aware of. And I would expect Mr. Scott would not ask a
2 question about that unless he has a good-faith basis and
3 believing that Investigator Beeman knew about that.

4 MR. MARRETT: I'm just checking off my list to see
03:29PM 5 if there's anything else. I don't have anything else to
6 address with the Court.

7 THE COURT: So I think we've discussed all my
8 issues.

9 I think, Mr. Scott, you wanted to give me an update on
03:29PM 10 discovery. But before we get to that, so the ball's in
11 counsel's court to confer, see if they can resolve this. If
12 they can't, to propose a *Daubert* hearing schedule. And I'm
13 going to need to know that within the next two days. I want to
14 know no later than Thursday.

03:29PM 15 MR. SCOTT: Yes, Your Honor. As we were sitting
16 here, I sent my expert an e-mail asking if he could be
17 available either Monday at 3 o'clock or Tuesday at 5 o'clock,
18 and I'll report back as soon as I hear. And if -- and I told
19 him we would make that happen, you know, under CJA and
03:30PM 20 everything if he needs to come up here an extra time. And if
21 he's testifying somewhere else, then maybe if it's acceptable
22 to the government he'll need to accomplish that hearing before
23 he goes on the witness stand. Or maybe we end up both putting
24 our pistols down and backing away expertwise if it comes to
03:30PM 25 that.

1 THE COURT: For what it's worth, that's my hope.
2 Because I see in both sides' interest to get this testimony in.
3 And I mean that sincerely. I just sense now -- you guys know
4 the case much better, but the real fight is going to be is this
03:30PM 5 personal use or distribution? And both experts, I think, the
6 jury is going to want to hear from. There's not many cases
7 where I think expert testimony is really critical, but I think
8 it's going to be quite important in this case.

9 Just for planning purposes, has Mr. Govey made a decision
03:31PM 10 about whether he's going to testify or not, or is he still
11 keeping that open?

12 MR. SCOTT: The proverbial game day decision, Your
13 Honor. So we're -- we don't know.

14 THE COURT: I think, again, please confer, because I
03:31PM 15 don't want to have to hear the testimony four times; right?
16 Dry run for each expert and then hear it again in trial.

17 MR. SCOTT: Understood, Your Honor.

18 In terms of discovery, there's a couple items I wanted to
19 put on the record. I did see the order that the Court issued
03:31PM 20 regarding in camera documents, what we've been referring to
21 here as the Frosio file. I met and conferred with the
22 government. I have been advised and absolutely accept the
23 representation that what the Court has ordered disclosed was in
24 a rather large batch of discovery that --

03:32PM 25 THE COURT: This thick. That's what I was given.

1 MR. SCOTT: Court's holding his finger up about two,
2 two and a half inches?

3 THE COURT: Wasn't it, Mr. Marrett? Was about this
4 thick?

03:32PM 5 MR. MARRETT: I believe it was about 50 or 60 pages,
6 if I remember correctly.

7 THE COURT: I think it was more than 50 or 60 pages
8 there. Was a lot of fluff, but --

9 MR. SCOTT: So I've been told that I received that,
03:32PM 10 that it was in a kind of a larger batch of other things as
11 well. My paralegal is going through that as we speak. But I
12 did want to make clear that I did -- I asked the government and
13 was told that what they provided to the Court and have
14 subsequently provided to us was given to them by the District
03:32PM 15 Attorney's Office.

16 And just in conferring with Mr. Govey, I'm made to
17 understand that the file that the district attorney had on this
18 Mr. Frosio apparently is a different file than what the special
19 handling unit or the Orange County Sheriff's Department
03:33PM 20 maintained for Mr. Frosio. And I've been trying to sort of
21 describe that distinction, but I wanted to put it again on the
22 record that we are trying to obtain as well the Orange County
23 Sheriff's Department's Frosio file. So I say that for the
24 government's benefit.

03:33PM 25 You know, and that's the specific file for what it's

1 worth, that Judge Goethals' order disclosed -- and then almost
2 immediately the case against Mr. Govey was dismissed in State
3 Court. The parties differ on the significance of that, but
4 chronologically that is how it happened. So it's that
03:33PM 5 sheriff's deputy file that we continue to be pressing for.

6 One additional discovery request I did want to make is
7 that in arguing the vindictive prosecution motion, the
8 government, at least from my perspective, seemed to not quarrel
9 with the idea that there were some conversations between
03:34PM 10 Mr. Beeman -- Investigator Beeman and counterparts on the
11 federal side that eventually made their way up to the decision
12 of whether or not to charge him.

13 And I do agree as a general matter, the attorney's
14 decision to charge or not to charge, that's kind of beyond the
03:34PM 15 ambit of what we're doing here. But I didn't hear objection or
16 contradiction of the notion, which has always been my belief --
17 my information or belief that Investigator Beeman, you know,
18 did, in fact, take some affirmative steps to pitch this case,
19 to put it colloquially, to his federal counterparts.

03:34PM 20 And if I can be even more specific, it is my information
21 and belief that ATF Agent Sanders, who is in the back of the
22 courtroom, I understand him to be functioning as the case
23 agent. He's been at every court date in this case. I believe
24 that Investigator Beeman made overtures and made communications
03:35PM 25 with Agent Sanders in an effort to have this case brought over

1 federally.

2 So in light of at least what I interpreted as sort of not
3 quarreling that that happened on the part of the government, I
4 would ask for any, you know, communications, whether it be, you
03:35PM 5 know, e-mail or text or memorialization of that effort on
6 Investigator Beeman's part specifically to Mr. Sanders -- to
7 Agent Sanders -- excuse me -- or to any other persons on the
8 federal side of the fence. For the reasons that the Court
9 stated before, I do think that that goes towards our theory of
03:35PM 10 the case vis-à-vis Investigator Beeman. So that's my request.

11 THE COURT: And I think, Mr. Marrett, what I want
12 you to do is do an investigation to see if there are -- before
13 you decide whether you're going to fight it, is there any
14 documents out there that the agent has reflecting communication
03:36PM 15 with Mr. Beeman that are relevant?

16 MR. MARRETT: Understood. And I do want to make
17 clear for the record that my failure to comment on that is not
18 me not objecting to it or agreeing that those occurred, I don't
19 have information as to whether that occurred or not. But I
03:36PM 20 will look into it before deciding whether we're going to agree
21 or litigate whether that's discoverable.

22 THE COURT: Right.

23 MR. MARRETT: The only other piece that I just
24 wanted to put on the record for the Court is since we're --
03:36PM 25 Mr. Scott brought up discovery update is just to put on the

1 record -- and I know the Court's not micromanaging discovery,
2 but just to put on the record that the government is in the
3 process of reviewing additional documents that it's going to
4 produce to the defense and is prioritizing the documents for
03:36PM 5 the witnesses that the government intends to call for
6 Investigator Beeman who the defense has suggested they've --
7 they have an intent to call as well as some search terms that
8 the defense has proposed to the government as well. So we're
9 in the process of doing that as expeditiously as we can in
03:37PM 10 advance of trial. So I want to put that on the record.

11 THE COURT: I appreciate that.

12 MR. MARRETT: There were just a couple things that
13 I -- just miscellaneous items that we haven't discussed in
14 other pretrial conferences, and I want to know what the Court's
03:37PM 15 preferences were.

16 As far as things like having the drugs in the courtroom,
17 we plan on having them in the courtroom with the agent at
18 counsel table and for the witnesses to -- for the case agent to
19 maintain custody and control of those, show them to any
03:37PM 20 witnesses and maintain custody of them in the courtroom. Is
21 that the Court's general practice or --

22 THE COURT: Pretty much, yes. Evidence like that, I
23 would want the agent to keep control of it. I'm a little bit
24 nervous of having drugs passed around to the jury just for the
03:38PM 25 simple fact, I don't want any liability or anybody saying

1 anything seeped through any of the material and got in their
2 skin or their blood system, if you follow me. If there's
3 irritation or burning, I don't want any of that. So I'm not
4 sure that we're going to need to pass around any package of
03:38PM 5 drugs.

6 For example, in cases with firearms, the firearm has
7 been -- all ammunition is taken out, it's been disarmed, and
8 the firearm is passed around the jurors. Or jurors, if they
9 want, they can come up and hold it. Our -- what are you
03:38PM 10 suggesting in this case that you want to do? Are you
11 envisioning just showing the jury the drugs, or are you
12 actually envisioning handing it to them and that they can pass
13 it around?

14 MR. MARRETT: And I don't intend to hand out the
03:39PM 15 drugs to the jury. My image in this is the case agent, the
16 witness on the stand, we have pictures of the drugs that we can
17 show to the jury.

18 THE COURT: Okay.

19 MR. MARRETT: So that would be my anticipation is
03:39PM 20 just for identification of the physical exhibit.

21 Relatedly there is the counterfeit or the ultra
22 obligations in this case as well as some of the templates and
23 other items of evidence that we'll be introducing. But I do
24 intend to ask the Court for permission to have the jury be able
03:39PM 25 to handle those and pass those around.

1 THE COURT: That would be fine.

2 MR. MARRETT: The only other thing I want to update
3 the Court on is I think we'll be filing an amended witness list
4 today. I anticipate calling two additional, very short
03:39PM 5 witnesses to testify, and we'll submit that updated witness
6 list today.

7 I think in our trial brief we updated the trial estimate
8 to three days. It's not due to the addition of these two
9 witnesses, it's due to the length of the cross-examination that
03:40PM 10 we experienced during the hearing last week. I think it was a
11 little more expansive than what I had anticipated in our
12 original trial estimate. So just for planning purposes for the
13 Court, I think that's -- our revised estimate would be three
14 days.

03:40PM 15 THE COURT: I was thinking of telling the potential
16 jurors that the trial is going to be four to six days. Is that
17 still a fair estimate?

18 MR. MARRETT: I think that's a fair estimate as long
19 as -- I believe it was two to three days is what the defense
03:40PM 20 had estimated for their defense case.

21 THE COURT: But as you're preparing for it,
22 Mr. Scott now, you know even more, do you think you can do it
23 in two days?

24 MR. SCOTT: I do. And, in fact, I think two days
03:41PM 25 would be the conservative kind of the outside goalpost.

1 While we're talking scheduling, I don't mean to interrupt,
2 but I wanted to flag for the Court, I think it's entirely
3 possible that this will be to the jury by Tuesday, February 6.
4 I think that would be the sixth trial day which, again, I think
03:41PM 5 is definitely an outside estimate. But I wanted to let the
6 Court know Murphy's law being what it is, I'm scheduled for
7 oral argument before the Ninth Circuit Tuesday morning at 9:30.
8 It's just here in Pasadena. I say "here," but it's up in
9 Pasadena.

03:41PM 10 If the jury is deliberating already, my intention is to
11 have a colleague there for that couple-hour block in case
12 something happens with the jury. But if -- and I think it's
13 very unlikely that we'll still be taking testimony or doing
14 anything like that. But I wanted to alert everyone of that
03:41PM 15 potential scheduling conflict at the front end and hopefully
16 it's not something that will end up interrupting.

17 THE COURT: And I appreciate that. And I'm taking
18 what you're saying, if the jury is out, that Mr. Govey would be
19 comfortable with someone replacing you for that?

03:42PM 20 MR. SCOTT: Just in terms of fielding jury notes.
21 Yes, it would be Mr. Jimenez that the Court knows.

22 THE COURT: Okay. All right. That's helpful. So
23 as far as the time estimate -- okay.

24 MR. MARRETT: And I don't have anything further
03:42PM 25 unless the Court has other issues.

1 THE COURT: No. Just resolve the *Daubert*.

2 Okay. All right. Well, then, I may see you before the
3 second -- excuse me. The trial is going to start the 30th.
4 Hopefully I won't. And assuming for the moment I won't see you
03:43PM 5 before we start the trial, if you could be here at 8 o'clock.
6 Usually the first day the jurors get up here late, but we're
7 going to try to get them up here on or before 9 o'clock. But I
8 want to be ready to go. Once we're in trial, we'll be starting
9 at 8:30. The first day they might be up here a little bit
03:43PM 10 late. Okay. All right. Thank you.

11 THE COURTROOM DEPUTY: All rise. Court is
12 adjourned.

13 **(Proceedings concluded at 3:43 p.m.)**

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COUNTY OF LOS ANGELES)
)
STATE OF CALIFORNIA)

I, DEBBIE HINO-SPAAN, FEDERAL OFFICIAL REALTIME
COURT REPORTER, in and for the United States District Court for
the Central District of California, do hereby certify that
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Date: March 9, 2018

/S/ DEBBIE HINO-SPAAN_

*Debbie Hino-Spaan, CSR No. 7953
Federal Official Court Reporter*